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RICHARD A. BROWN
DISTRICT ATTORNEY

September 14, 2012

Joaquin Sapien
Pro Publica

Re: Pro Publica Inquiry

Dear Mr. Sapien:

We have carefully reviewed the cases to which you have made reference following what you describe as the "methodology derived from a 2010 Northern California Innocence Project report." The California District Attorneys Association (CDAA), however, has identified several of the reasons why that "methodology" does not accurately identify the types of actual misconduct, such as intentional deceptions to try to deceive a court or jury, which require the type of discipline you suggest to be appropriate whenever an appellate court uses a phrase such as "prosecutorial misconduct" in reversing a conviction.

As the CDAA has said, the "characteriz[ation] of mere mistakes and errors as 'misconduct'. . . classifying cases where such errors occur in the same categories as those involving intentional misconduct" does a grave disservice to the women and men who strive every day for justice and do so with the highest regard for the integrity of the judicial system. Our Assistants are well trained and continually informed of the various legal and ethical issues and decisions applicable to their work, but it is a sad truth that occasionally we will find that one has failed to live up to the very serious responsibilities imposed on a public prosecutor.

You have identified thirteen cases over a ten year period in which the courts "concluded that misconduct not only occurred, but was also harmful, necessitating the reversal of a conviction or the modification of a judgment." Beyond our view that the methodology by which you have reached this conclusion is flawed, some additional context is also necessary before discussing the specific cases to which you have made reference.

As has often been observed, the duties of a public prosecutor are myriad and our obligations -- to the law, to the public at large, and to the victims of crime -- are considerably different than those of other lawyers appearing in our courts. We understand, as the Supreme Court has held, that "' [t]he office of public prosecutor is one which must be administered with courage and independence' [and a] prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler v. Pachtman*, 424 U.S. 409, 423-424 (1976), quoting from *Pearson v. Reed*, 44 P. 2d 592, 597 (Cal. 1935). Yet, we also know, as the Court held in providing that prosecutors should be absolutely immune from civil lawsuit based on the exercise of prosecutorial duties, that "[t]he prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and -- ultimately in every case -- the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. . . .Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Imbler v. Pachtman*, 424 U.S. at 425-426.

In the twenty-year period from June,1991, when Richard A. Brown first assumed the duties of District Attorney, through the last time we examined this question in September of2011, the Appellate Division, Second Department, decided 4,841 appeals from convictions in Queens County. From among those cases, only seven cases (a little more than one-tenth of one percent) were reversed based on *Brady* violations. Moreover, only 14% of the total number of convictions reversed by the Appellate Division were the result of prosecutorial error, in contrast to the 86% of cases reversed due to court error or the "ineffective assistance" of defendant's attorney.

These statistics are not intended to minimize our obligations or to suggest that we are unconcerned with those situations when we have failed to satisfy our obligations under the law. Any instance when a conviction is reversed is the subject for discussion among the appropriate people within the Office and many of these cases are used in further training. There is reason to believe that those efforts have had the desired effect since of the 682 cases decided by the Appellate Division over the last five years of that period, none was reversed based on *Brady.*

At the same time, it must be recognized that the decision as to what constitutes material that must be disclosed under *Brady* is not always simple to make and often subject to debate. Indeed, the case law governing this issue has evolved and changed since *Brady* was first decided. That is why defendants have the right to challenge those decisions in the

trial court or on appeal. You will find, indeed, that in many instances, responsible judges disagree as to whether a undisclosed item truly constitutes *Brady* material or whether the failure to disclose the item sufficiently denied the defendant a fair trial so as to warrant reversal of the conviction.

The Supreme Court has recently observed what has long been understood by most prosecutors, if not by the general public: that "*Brady* has gray areas and some *Brady* decisions are difficult." *Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011). Thus, while mistakes will "inevitably be made" those mistakes cannot fairly be said to constitute deliberate attempts to violate a defendant's rights such that discipline would be necessary or even appropriate. Instead, these errors are best addressed through training.

In fact, the very case where the Supreme Court made that observation illustrates just how difficult those questions can be. Even though *Connick* reached the Court with both parties, a Louisiana prosecutor and a defendant his office prosecuted, conceding that there had been a failure to disclose *Brady* material, *id.* at 1353, 1357, 1358, at least one of the justices disagreed, finding that except for one unquestionably bad faith act by a single prosecutor, which was not at issue in the posture of the case before the Court, "[t]here was probably no *Brady* violation at all." *Id.* at 1369 (Scalia, Alito JJ., concurring). The point is not, of course, whether Justice Scalia was correct, or whether the concession was one which the law required, but that judges and litigants could have different opinions to what must be disclosed. Justice Scalia's concurring opinion made the point well: "*Brady* mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a *Batson* claim; crossing the line in closing argument; or eliciting hearsay that violates the Confrontation Clause." *Id.* at 1367. None of those errors should automatically be classified as "misconduct."

There have been instances where the majority of the judges who ruled on the conduct in question ruled in our favor but where, for instance, two judges of the Second Circuit ultimately ruled against us. In those instances, whether we agree with the ruling or with what other judges held in the very same case, we are, of course, bound by the views of a two-judge majority of a three-judge panel in the federal appeals court. Under those circumstances, we would be hard pressed to accuse or discipline an Assistant District Attorney based on "misconduct" where even one judge, much less multiple judges or even a majority of judges, found the same conduct to be proper.

Unfortunately, the phrase often used by appellate courts to identify those errors attributable to prosecutors --"prosecutorial misconduct"– is as often applied to simple disagreements over the requirements of the law or other errors in interpretation of the law. Our prosecutors are occasionally found to have made summation arguments a court finds to have been improper even where no defense attorney objected or a trial judge overruled that

objection, which would reasonably lead that prosecutor to believe that there was no legal problem with the argument being made.

The point is, as we have discussed and the American Bar Association has now recognized, the phrase "prosecutorial misconduct" has been used in such a way as to confuse many people. In fact, the methodology you employed to identify the cases about which you have sought our comment underscores the concerns raised by the ABA that "[a] finding of 'prosecutorial misconduct' may be perceived as reflecting wrongdoing, or even professional misconduct, even in cases where such a perception is entirely unwarranted."

It is the District Attorney's responsibility to make that distinction when determining whether some action is required based on a court's reversal of an individual Assistant District Attorney's action or inaction. Intentional violations of the law or of a court's directive are almost always intolerable and, as discussed below, we have responded to those rare instances in what we believe to be the appropriate manner. For the reasons outlined below, other issues raised by appellate courts in reversing or vacating convictions are reviewed differently.

However, prior to discussing the individual matters about which you have made inquiry, it may prove useful to provide you with a detailed description of the comprehensive training efforts engaged in by our office.

Training and Supervision

Review of cases that result in reversal, it should be noted, is but one aspect of a rigorous program of training and supervision employed in this Office. We are quite proud of the in-house legal training which begins with a four-week training program for newly-hired Assistant District Attorneys that includes specific instructions about our discovery and *Brady* obligations. After five or six months of experience prosecuting misdemeanor cases, the new Assistant District Attorneys receive additional training in advocacy skills, including how best to make appropriate, persuasive arguments during summation, while avoiding those which would be unethical or improper. Another two-week training program takes place before an Assistant District Attorney prosecutes felony level cases.

In addition, monthly Continuing Legal Education ("CLE") programs are presented by the Office and, of course, all Assistants are required to meet the statewide CLE requirements imposed by the Office of Court Administration. The District Attorney himself is chairman of the Board of Directors of The New York Prosecutors Training Institute ("NYPTI") and our Assistants are frequent lecturers and participants in the many training programs NYPTI presents. The high regard in which our senior Assistants are held by our colleagues may be seen not only by the many times they are asked to assist in NYPTI programs, but also in

training Assistants in many other district attorneys' offices throughout the state. Furthermore, members of this Office were instrumental in creating *The Right Thing*, an ethics handbook for prosecutors statewide.

Beyond all that formal training, plus the subject matter training that members of our specialized bureaus, such as Domestic Violence or Special Victims receive, all Assistant District Attorneys regularly receive copies of cases decided by courts throughout the state and the United States Supreme Court. Additionally, the District Attorney has established a Committee on Professional Standards to deal with any issues reflecting on the ethics or professional performance of any member of the office, whether based on arguments made by an attorney representing a defendant appealing a conviction or by allegations made to the Office by any other means.

In sum, the District Attorney has instituted extensive programs to train and supervise prosecutors. In the end, the manner by which the District Attorney discharges his duties, including his management of the Office, are subject to review by the electorate. We believe our record speaks for itself and we are proud of it.

A fair and reasonable review of the thirteen cases you have mentioned may well illustrate that point.

The Thirteen Specified Cases

The cases which you have brought to the Office's attention involve an array of factual scenarios, and they are summarized and briefly discussed below. Together, they illustrate the difference between actual misconduct by an Assistant District Attorney and other errors which what appellate courts have either held to be the basis for reversal or vacatur of a conviction or otherwise noted as improper.

Immediately after we discovered that an Assistant District Attorney had told a trial judge that he did not know the whereabouts of a witness he had interviewed four days earlier, the District Attorney advised the court, consented to the dismissal of the conviction, reassigned the Assistant, removed him from all case-related responsibilities, assigned him to essentially clerical duties and advised the appropriate disciplinary authorities. That Assistant's resignation was accepted shortly thereafter.

The same Assistant District Attorney was involved in the misconduct described in two other cases, *People v. Walters*, 251 A.D.2d 433 (2d Dept. 1998) and *People v. Bennett*, 40 A.D.3d 653 (2d Dept. 2007). A Grievance Committee, which is charged with the responsibility of reviewing misconduct within the Second Department, reviewed the *Walters* case and determined that it warranted sending a private and confidential letter of warning to

the Assistant District Attorney, but nothing further beyond that. We learned of that letter only after we advised the committee of the more serious misconduct which had resulted in that Assistant's resignation. Since the *Bennett* case was not appealed until years after that Assistant left, we did not learn of the misconduct in the case until well after his resignation.

That type of serious misconduct, which this Office will not tolerate, has little in common with anything that took place in the other cases to which you have referred. Indeed, in two of those cases, *People v. Frantz* and *People v. Mitchell*, there was no finding of any misconduct by an Assistant District Attorney. *In People v. Frantz*, 57 A.D.3d 692 (2d Dept. 2008), for instance, the Appellate Division held that a hearing was required on defendant's claim that exculpatory statements were made by a witness that had not been disclosed to defendant prior to trial. Following that hearing, a judge found that defendant failed to establish that the witness made any statements to the police.

People v. Mitchell, 14 A.D.3d 579 (2d Dept. 2005) was reversed because of the late disclosure of handwritten copies of the complaint reports from two burglary victims. That late disclosure, though, was not the fault of the Assistant District Attorney who had unsuccessfully attempted to obtain those reports from the police department prior to trial and immediately disclosed them to the defendant's attorney when a police officer brought the reports to court during the trial.

In our view, none of the other cases on your list presents any questions of actual misconduct by an Assistant District Attorney, even if appellate courts found fault with how the case was prosecuted. For instance, in *People v. Rosas*, 297 A.D.2d 390 (2d Dept. 2002), the Appellate Division held that a memorandum, which ostensibly summarized statements made by the victim's son, should have been disclosed to the defendant because he was a witness at the trial. The trial judge, however, agreed with us that the memorandum in question did not reflect actual statements made by the witness and was simply an Assistant District Attorney's summary of the evidence in the case and not subject to discovery. Moreover, the trial judge also held, as we contended, that the failure to disclose that document had no bearing on the jury's verdict.

Bound as we are, of course, by the Appellate Division's contrary view, the case had to be re-tried. Yet, with defense counsel fully armed with the memorandum in question, the defendant was convicted yet again of second-degree murder, and sentenced on October 15, 2003. There was, in our view, nothing in that case which required that any Assistant District Attorney be reprimanded or disciplined simply because the Appellate Division disagreed with a legal conclusion.

Similarly, there was nothing in four of the other cases on your list – *Lauderdale*, *Brown*, *Anderson*, and *Miao* – which warrant any rebuke of any Assistant District Attorney

beyond the appellate court's comments, much less any "disciplinary action." While the conviction in *People v. Brown*, 30 A.D.3d 609 (2d Dept. 2006) for attempted first-degree murder and other counts was reversed based on an error by the trial judge, the Appellate Division also criticized the Assistant District Attorney over several aspects of the trial. The Court's comments were obviously worthy of note, but none presented issues of particular significance from a disciplinary point of view. For instance, while the Appellate Division expressed a concern about the prosecutor appearing as an unsworn witness, defense counsel raised no such objection at the trial and, indeed, had such an issue been brought up, the Assistant District Attorney could have simply rephrased his question to avoid mentioning his own role in a prior discussion with a witness. More significantly, the trial judge overruled a general objection to the prosecutor's questions and ruled that they were proper.

If there were portions of the prosecutor's summation argument that, in hindsight, might have been best left unsaid, none misstated the evidence at trial, and the so-called "public safety" argument, that defendant had endangered children sleeping in nearby houses by firing his weapon, was a reasonable inference from the evidence, which showed that a shooting had occurred in a residential neighborhood, that defendant fired about twelve gunshots and that some of the bullets were embedded in the surrounding residential buildings. We likewise see no misconduct in a prosecutor's response to the argument of defense attorney that suggested that we had intended to keep from them an array of photographs used to identify the defendant, which defense counsel presented as evidence. Since the law prohibits a prosecutor from presenting evidence of such photo arrays, the Assistant District Attorney asked the judge to so instruct the jury and the jury was simply reminded of that instruction during the prosecutor's summation.

There is, in sum, nothing that took place at that trial which even approaches what could reasonably warrant any action concerning the prosecutor. Likewise, the reversal of the second-degree murder conviction in *People v. Anderson*, 83 A.D.3d 854 (2d Dept. 2010), was, in the main, based on aspects of the cross-examination of defendant which the trial court found to be permissible, though the Appellate Division disagreed, as well as comments made during summation to which defendant did not object and which the trial judge permitted.

Similarly, the first-degree manslaughter conviction in *People v. Lauderdale*, 295 A.D.2d 539 (2d Dept. 2002), was also reversed because of an error by the trial judge. The Appellate Division also noted a prosecutor's "31 references" to the defendant's nickname, "Homicide," to which defense counsel never objected in holding that the failure to object constituted the ineffective assistance of counsel.

In *People v. Ni*, 293 A.D.2d 552 (2d Dept. 2002), the Appellate Division, disagreeing with the trial judge, found that the evidence was insufficient to warrant the main charge against defendant, and reversed convictions of third-degree assault and second-degree

harassment because of what it called "flagrant" but unspecified "prosecutorial misconduct" during the prosecutor's opening and closing statements. Here, too, though, defendant's attorney did not object to most of the comments. The Assistant District Attorney who tried the case had separate discussions with the Chief Assistant District Attorney, and the chief of the Appeals Bureau about the issues that led to the reversal of these convictions and he recalls them today, ten years later.

The writ of *habeas corpus* issued in *Turner v. Schriver*, 327 F. Supp.2d 174 (E.D.N.Y. 2004), concerned a 1988 first-degree robbery trial in which the defendant was not told about the victim's criminal history. The reason that history was not disclosed was that the complaining witness told the prosecutor that he did not have a record, and was taken at his word. Though the federal court faulted the Assistant District Attorney for not seeking verification of the victim's assertion that he had no criminal history, New York specifically provided then (and still does) that our obligation was to turn over whatever we actually had in our possession, and did not require that we try to obtain further information. Obtaining records of that sort in 1988, even concerning cases prosecuted in other parts of our Office, was not as simple as today's technology allows. For that reason, and the general concern we have about not treating a crime victim as if he or she was the criminal, there was no universally held view as to when and whether such searches for a victim's criminal history should be conducted prior to trial.

That is no longer the case given what we are now able to do, with considerably greater simplicity than we could in 1988. No single Assistant District Attorney could be legitimately criticized, much less disciplined, for failing to do what the law does not require and what was then limited by the technology of the time.

It is difficult to fully discuss the issues from *People v. Baba-Ali*, 179 A.D.2d 725 (2d Dept. 1992), in part because of the continued litigation in the Court of Claims. Equally complicating is that the main issue in the post-conviction litigation; the timing of the disclosure of certain medical records to defendant, has been in dispute for over twenty years.

There is no dispute, however, that by September 1988, more than a year before trial, and then also in February 1989, the People disclosed some of the medical records to the defense. There is a dispute regarding whether the People disclosed the remaining records on October 30, 1989, the day prior to trial – as defendant's attorney contends – or disclosed the records in February of 1989, as the prosecutor has said. Indeed, in a motion to amend the Appellate Division decision and order reversing the case, the trial prosecutor submitted an affidavit swearing that she had disclosed the records to defendant in February 1989. Therefore, while this case involves late disclosure – and not outright suppression – the prosecutor has maintained for the last twenty years that she disclosed the records in a timely

manner. In the absence of any proof t the contrary, there is no misconduct that would requre further action.

Su v. Filion, 335 F.3d 119 (2nd Cir. 2003), concerns a 1992 conviction on two counts of attempted murder in the second degree and related charges. Defendant's claims concerning the specific details of a cooperation agreement with a trial witness and failure to correct the false testimony of that witness were rejected by the Appellate Division on defendant's original appeal and by the trial court on defendant's motion to vacate the conviction -- a decision with which the Appellate Division also agreed. Defendant then sought a writ of *habeas corpus* in federal court and his petition was denied there, too. It was the denial of the writ which was reversed by a three judge panel of the Second Circuit in 2003.

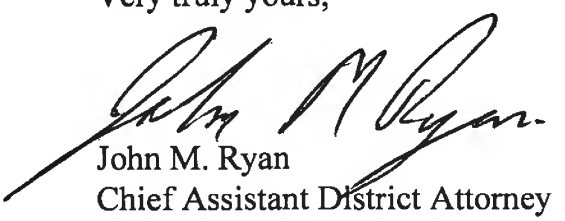
There is no question that we are bound by the decision of the Second Circuit. At the same time, the range of the different judicial opinions as to exactly what took place, and whether defendant was truly prejudiced by something the Assistant District Attorney did or did not do, at least suggests that there are reasonable questions about her conduct at trial. In any event, she was no longer a member of this Office when the Second Circuit issued its opinion eleven years after the trial. The lengthy period between the crime and the Second Circuit's order made it impossible to re-try the case and it had to be dismissed.

We are, justifiably, proud of the way we meet our responsibilities to prosecute those who commit crimes in Queens County and, where appropriate, to exonerate those wrongly charged with crimes. The many professionals who do this work on behalf of the People of the State of New York are as dedicated to their responsibilities to act within the law as they are in achieving justice in each of the cases they handle. There are times, of course, when appellate courts have disagreed with a position we have taken, an argument we have made, or our views of what the law requires. Except in the rarest of circumstances, those determinations do not show or even intimate wrongdoing on the part of an Assistant, but simply a difference of opinion as to the requirements of law.

You are quite right in suggesting that "public prosecutors serve a much different purpose than other kinds of attorneys, in that they are public servants and they make decisions which can drastically affect the lives of criminal defendants." We would be proud to compare our record with that of any other group of attorneys if the records of the disciplinary boards were made public. We can say, however, with great confidence, that the reason so few Assistant District Attorneys have been subject to professional discipline is that we view our responsibilities to the law and justice as requiring that we conduct ourselves in a manner that exceeds the ethical standards applicable to private attorneys who represent private clients.

If you take the time to place these cases in a factual context, and be careful not to confuse an appellate court's disagreement over the requirements of law with a finding of intentional misconduct, you will, we trust, reasonably conclude that this Office maintains the highest of ethical standards.

Very truly yours,



John M. Ryan
Chief Assistant District Attorney